

National Advisory Council for Environmental Policy and Technology's Assumable Waters Subcommittee Final Report and Recommendations

**Wetlands National Program Meeting
May 25, 2017**

Presented by: Michael Szerlog and Kathy Hurd

Only two states have assumed the federal CWA 404 permitting program which allows states to administer the section 404 program for discharges into the navigable waters of their state except certain waters retained by the USACE. There are a number of known barriers, including clarification on assumable waters.

This issue dates to the beginning of the amendments to CWA in 1977.

We stood up this FACA subcommittee in September 2015.

We have provided support to interested states and have attempted to remove the barriers to assumption on more than one instance – we confirmed that EPA need not undertake ESA Section 7 consultation when approving a state or tribal program. (2011)

We support state and tribal efforts looking into Assumption with technical advice, attending meetings about the requirements and have funded many grants focused on exploring assumption under our Wetland Program Development Grant program.

Some states have indicated they are likely to pursue assumption if there is greater clarity and enough waters to make it worthwhile.

Agenda

- Legislative history
- How did we get here?
- Subcommittee understandings
- NACEPT Recommendations
 - “Waters”
 - “Adjacent Wetlands”
- Next Steps in the Process
- Discussion Questions
- Appendices and Reference Materials

FACA

- Federal Advisory Committee Act
- Provide advice and recommendations to Agencies
- Members are generally volunteers, diverse, representative of all interests

The Federal Advisory Committee Act covers advice-gathering activities when an agency intends to confer with stakeholders on a particular topic on a recurring basis

FACA requires that such activities are publicly open and transparent. That's why we give notice in the FR and hold open meetings with an opportunity for public comment.

FACA also requires that the agency ensure that the composition of the committee is balanced and representative.

FACA also requires that we charter the group and notify Congress.

In our case, we formed a subcommittee under an existing FACA, NACEPT.

By policy, EPA operates subcommittees in the same manner as a parent committee, even though we are not required to follow the formal requirements.

Legislative History of CWA § 404

- Prior to 1972, the USACE administered permits for discharges of dredged or fill material into navigable waters pursuant to the Rivers and Harbors Act (RHA).
 - USACE maintains lists of RHA-regulated waters in almost every state.
- Following passage of the CWA, courts held that the USACE's jurisdiction under CWA was broader than the scope of "navigable waters" under the RHA.
 - In 1977, the USACE issued regulations defining the scope of CWA jurisdiction roughly similarly to the regulations in effect today.
- To alleviate concerns about federal expansion of jurisdiction under the CWA, Congress added § 404(g) to the Act, though the USACE would retain jurisdiction over certain waters.
- The legislative history of § 404(g) makes clear that Congress intended the scope of USACE-retained waters to be equivalent to the waters long subject to USACE RHA § 10 jurisdiction.

CWA § 404 (g)(1)

Which waters are assumable by states and tribes?

§404(g)(1):

" . . . navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction . . ."

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404 is unique in that the state/tribe cannot take on the entire permitting program, the USACE keeps authority over some waters.

State/tribal program must comply with the CWA and regulations

State program must be no less stringent than and cover same scope – EPA approved part is same scope.

How did we get here?

- Request from state associations to clarify which waters they may assume CWA § 404 permitting authority for (April 2014).
 - Assumable waters are a subset of waters of the U.S. To avoid conflating this issue with the question of which waters are jurisdictional under the CWA, EPA sought and undertook a separate effort.
- EPA response:
 - Committed to look at and provide clarity - letters June & November 2014.
 - Establishment of Assumable Waters Subcommittee
 - Solicitation and appointment of members – March and August 2015.
 - 22 members: states, tribes, federal agencies, associations, industry, agriculture.
- 8 Subcommittee meetings – October 2015 – April 2017.
- Subcommittee recommendations to NACEPT – May 10, 2017.
 - NACEPT approved the report as is.
 - NACEPT crafted cover-letter and sent report and recommendations to EPA Administrator Pruitt - [May 19, 2017].

Key Subcommittee Understandings

- Recommendations developed against background of the following assumptions:
 - A state or tribe may only be authorized to assume the CWA § 404 program if it has authority over all assumable waters of the U.S., and demonstrates that it will apply legal standards consistent with the CWA requirements.
 - Assumption **does not alter CWA jurisdiction over waters of the U.S.**
 - **Nothing in the report or recommendations** is intended to alter in any way the definition or scope of CWA jurisdiction.
 - Report **speaks to the administrative division** of authority under CWA § 404 between the USACE and an approved state or tribe.
 - Per the charge, recommendations are intended to provide clarity, to be practical and readily implementable in the field, and to be consistent with the CWA, including § 404(g)(1).
- Waters, such as rivers, lakes, and streams, and adjacent wetlands are clearly linked legally, in policy, and in hydrology, and in total are often referred to as “waters.”
 - For the purposes of developing recommendations and for use in the report, the Subcommittee chose and used two terms: “**waters**” and “**adjacent wetlands.**”

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USFWS did not take a position on the recommendations, not that they did not like them, they just wished to not take a formal position. Their input was important to the formulation of the recommendations.

Recommendations

- Subcommittee “Agreement”
 - Although EPA was a member, EPA did not take a position regarding the specific recommendations made by the Subcommittee.
 - “Recommending Members” - members who took a position regarding the recommendations.
 - These include all members, including the USACE, but not the EPA and the USFWS*.
- On the two major recommendations all recommending members were in agreement with the exception of the USACE. Thus, majority and minority recommendations.
- Additional recommendations regarding process and coordination are proffered in the report. Recommending members were in agreement with these - as long as there was no conflict with their preferred recommendation.

* USFWS participated but did not take a position on final recommendations.

Origin and Purpose of CWA § 404(g)

Workgroup looked at origin and implementation of § 404(g), concluding:

- The legislative history of § 404(g) in both the House and the Senate evidences a Congressional expectation that most states would assume the § 404 program, thereby effectively limiting USACE permitting authority to Phase I waters, except waters deemed navigable based solely on historical use (i.e., those waters subject to regulation by the USACE under § 10 of the RHA).
- No definitive meaning of the term “adjacent” wetlands in § 404(g)(1) emerges from a review of the legislative history. Therefore, the meaning of adjacency within § 404(g)(1) is susceptible to various interpretations.

Waters Alternatives

- **Waters Alternative A:** Case-by-case determination of USACE-retained and state- or tribal-assumable waters at the time of program assumption (the status quo).
- **Waters Alternative B:** Primary dependence on RHA § 10 Lists of navigable waters to define USACE-retained waters.
- **Waters Alternative C:** RHA § 10 waters plus CWA (a)(1) TNW waters as defined at 33 CFR 328.3(a)(1) and in Appendix D* as USACE-retained waters

* Appendix D of the 2007 "U.S. Army Corps of Engineers Jurisdictional Determination Instructional Guidebook"

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Alternative A: This is "status quo" – where states, tribes, and USACE districts struggle to define retained and assumed waters. - Because Waters Alternative A would not meet the charge for recommendations that are clear, easily understood and implementable in the field, alternative A was not put forward.

Alternative B: Alternative B Proposes using existing RHA § 10 lists to define USACE-retained waters. All District offices maintain § 10 lists for all states - except Hawaii.

When a state or tribe initiates the assumption process, the District will use the § 10 list to develop a List of Retained Waters by: deleting waters on the §10 list based on historical use only (applying the relevant factors set forth in the RHA § 10 regulations); in the case of a state assumption, adding tribal waters, and identifying and adding waters that appropriately belong on the § 10 list. E.g., waters are eligible for but are not included on RHA § 10 list at the time of assumption; some alteration in the physical condition of a water such that it is now a § 10 water, or following consideration of the RHA case law and relevant factors set forth in the RHA § 10 regulations.

Alternative C: Retained waters would be determined using both the RHA Section 10 lists, and additional waters determined by the USACE to be Traditional Navigable Waters (TNWs, or (a)(1) waters) under the CWA.

USACE lists of RHA § 10 waters (as in Waters Alternative B) and any waters for which TNW stand-alone determinations (USACE or EPA) have been previously made; and,

Case-specific TNW determinations will be evaluated to determine if that water should be added to the retained navigable waters [as/under] a stand-alone determination.

Waters Recommendations

- **Majority recommendation:** Waters Alternative B – Primary Dependence on RHA Section 10 Lists of Navigable Waters to Define USACE Retained Waters.
- **USACE recommendation:** Waters Alternative C – Section 10 waters plus CWA (a)(1) TNW Waters as Retained Waters.

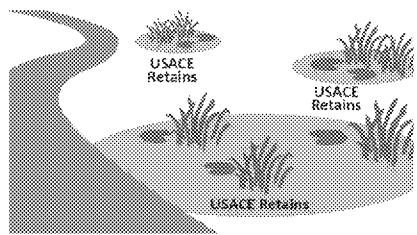
Alternative B Rationale: These lists are compiled and maintained by the USACE district offices for every state except Hawaii, and the majority recommends they be used with two minor modifications:

any waters that are on the §10 lists based solely on historic use (e.g. based solely on historic fur trading) are not to be retained (based on the Congressional record and statute), and waters that are assumable by a tribe (as defined in the report) may also be retained by the USACE when a state assumes the program.

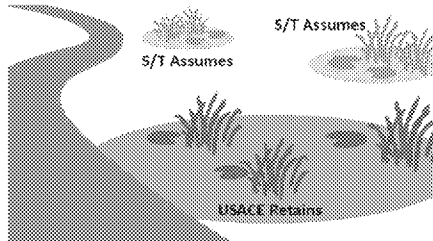
Recognizes that waters may be added to §10 lists after a state or tribe assumes the program, and recommends in that case, such waters may also be added to lists of USACE retained waters at that time.

Alternative C Rationale: The USACE believes there should not be a distinction between different uses of the term “navigable waters” under different sections of the statute). While the statutory language of the CWA Section 404(g)(1) parenthetical waters differs from the regulatory language of 328.3(a)(1), the USACE believes the interpretation of the term “navigable waters” is the same (other than those waters considered navigable based solely on their historic use).

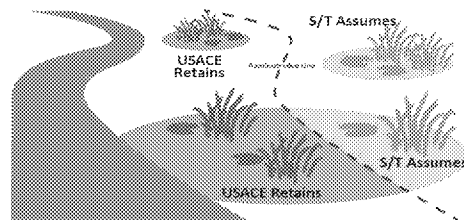
Wetlands Alternatives



Wetlands Alternative A: USACE retains all wetlands whether touching or not touching retained navigable waters, regardless of reach.



Wetlands Alternative B: USACE retains entirety of wetlands touching retained waters, regardless of reach.



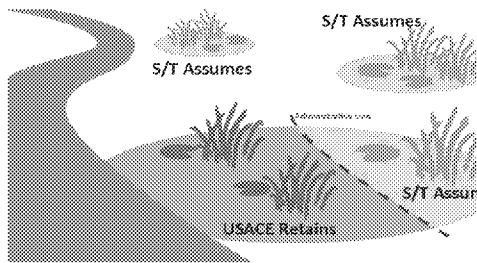
Wetlands Alternative C: Establishment of a National Administrative Boundary.

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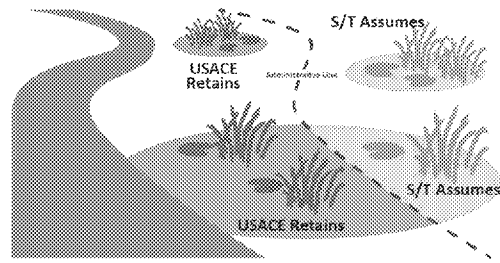
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Wetlands Alternatives C1, C2, C3

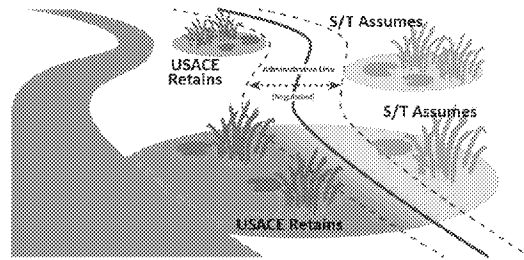
Wetlands Alternative C1



Wetlands Alternative C2



Wetlands Alternative C3



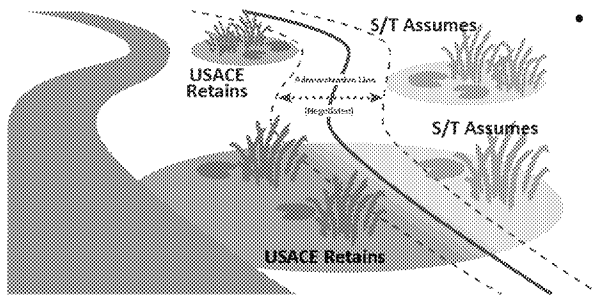
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Recommendations for Adjacent Wetlands

Majority Recommendation

- USACE retains administrative authority over all wetlands adjacent to retained navigable waters landward to an administrative boundary established during development of an MOA between the state or tribe and the USACE during the process of assumption.
- The USACE CWA regulatory definition of “adjacent” would be used to identify adjacent wetlands, but the USACE retains administrative authority only over adjacent wetlands within the agreed upon administrative boundary.

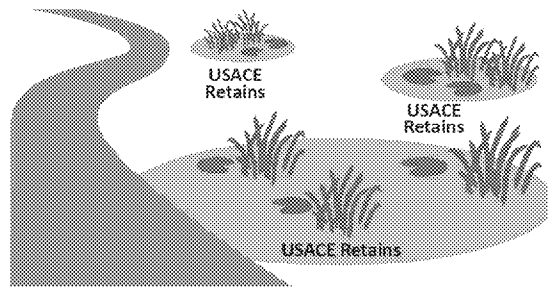


- Administrative line negotiated would take into account existing state/tribal regulations or natural features that would increase practicality and/or public understanding; if no change were negotiated, a 300-foot national administrative default line would be used.

Recommendations for Adjacent Wetlands

Minority Recommendation

- The USACE retain the entirety of wetlands that are “adjacent” to retained navigable waters, using the definition of adjacent wetlands currently being used by the USACE for regulatory actions under §404(i.e. the wetlands defined as adjacent under 33 CFR 328.3, implemented through the 2008 Rapanos guidance).
- The USACE believes that this recommendation is consistent with CWA §404, provides clarity regarding the permitting authority, and is easily understood and implementable in the field.



Summary of Recommendations

- **Majority recommendations:**

- *Waters Alternative B* – Primary Dependence on RHA Section 10 Lists of Navigable Waters to Define USACE Retained Waters.
- *Wetlands Alternative C3* -- USACE Retains All Wetlands Landward to an Administrative Boundary Established During the Development of the Memorandum of Agreement with the USACE, with a 300-foot National Administrative Boundary as a Default.

- **USACE recommendations:**

- *Waters Alternative C* – Section 10 waters plus CWA (a)(1) TNW Waters as Retained Waters.
- *Wetlands Alternative A* – USACE Retains All Adjacent Regardless of Furthest Reach.

Next Steps in the Process

- Administrator thank you letter to NACEPT and the Subcommittee members.
- EPA considers the recommendations
 - Will need to consult with OGC on approach and recommendation for the Administrator.
 - Present recommendations to Administrator.
- EPA proceeds with any potential efforts to provide clarity
 - Coordination with USACE and other Agencies
 - Develop policy(ies)?
 - Regulatory revision?

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After NACEPT conveys the recommendations to EPA, we will acknowledge and thank each member with a letter signed by the Administrator.

The appointments, will expire on September 9, 2017.

The states and state associations will expect us to take some affirmative action in response

It is the Administrator's prerogative what to do next; we are under no strict obligation to do so, but the states will likely push for some action

Any rule or policy or guidance would need to be closely coordinated with Corps

We believe the states could be given greater certainty and latitude to issue permits under 404 – either through rulemaking or guidance.

Discussion Questions

- Are the recommendations practical and easily implementable in the field?
- What benefits to clarity do they provide?
- What challenges do you see in implementing any of the options?
- What should we consider when moving forward?
 - Guidance?
 - Rulemaking?
 - Who to coordinate with in other Agencies?

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Appendices & Reference Materials

- Subcommittee members
- Executive summary of report to NACEPT can be found at:
<https://www.epa.gov/sites/production/files/2017-05/documents/aws Subcommittee final draft report 4-30-17.pdf>
- Definitions 404(g)(1) and (a)(1) waters
- Why is clarity important?

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Definitions 404(g)(1) and (a)(1) Waters

The language in § 404(g)(1) describing those waters that the Corps would retain closely resembles the long-standing regulatory description of traditional navigable waters, the first paragraph in the definition of waters of the US.

Waters the Corps would retain under Section 404(g)(1):

“those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce, commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto”

Current paragraph (a)(1) of the definition of “waters of the US”:

“All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;” defined in 1980?

Why is Clarity Important?

Assumption request statutory requirements:

- Description of waters regulated by the state or tribe.
- Memorandum of Agreement with USACE describing waters not assumed by the state or tribe – the USACE retains permitting authority over these waters.
- Description of funding and staffing levels.
- Description of the state or tribal program.

States cite lack of clarity as a barrier to assumption:

- Difficult to design a program and estimate costs if scope of responsibility is unknown.
- Lack of guidance and specific regulation on CWA § 404 (g)(1) (to states or USACE staff) results in inconsistency.
- Only MI and NJ have assumed the program since 1977 CWA amendments - 24 others investigated.

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The lack of guidance/clarity allowed for variability in how the two states, MI and NJ and the USACE defined the retained waters. However, since this time, the lack of clarity has become a stumbling block for states and tribes particularly as our understanding of Waters of the US evolves.